IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2007 Session

TAMARA LU WILLIAMS (LANKFORD) v. ERNEST BLAND WILLIAMS IV

A Direct Appeal from the Circuit Court for Davidson County
No. 94D-269 The Honorable Carol Soloman, Judge

No. M2007-00381-COA-R3-CV - Filed November 16, 2007

Mother petitions trial court seeking reimbursement of unpaid medical expenses, child support, and income information from Father. Father moved to dismiss the petition on the grounds of *res judicata.* The trial court granted Father's motion, dismissed Mother's petition, and awarded Father attorney's fees. Mother appeals and argues that the trial court erred in dismissing her petition, and in admitting evidence of the parties previous settlement negotiations. Mother also argues that the trial court abused its discretion in awarding attorney's fees to Father. We reverse and remand.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

W. FRANK CRAWFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and JEFFREY STEWART, SP.J., joined.

Gregory D. Smith and Donna L. Roberts of Nashville, Tennessee for Appellant, Tamara Lu Williams (Lankford)

Larry G. Hayes, Jr. of Nashville, Tennessee for Appellee, Ernest Bland Williams IV

OPINION

Facts/Procedural History

Tamara Lu Lankford, Plaintiff/Appellant (hereinafter "Mother"), and Ernest Bland Williams, Defendant/Appellee (hereinafter "Father") were divorced by Final Decree on August 15, 1994. Appended to the Final Decree was the Marital Dissolution Agreement (hereinafter "MDA") requiring Father to pay Mother rehabilitative alimony in the amount of $2,500 a month from July 1994 to June 1999 and $2,000 per month for child support. Mother

was awarded absolute care, custody, and control of their children. Father was awarded liberal visitation privileges with the children.

Since the parties' divorce, three petitions have been filed. On September 10, 2004, Father filed a "Petition to Modify and for Injunctive Relief" seeking to modify custody, visitation, and child support. The parties began negotiating a settlement with regard to the amount of child support obligation by Father. On November 18, 2004, an Agreed Order was filed which resolved some of the parties' disputed issues and expressly reserved all other matters.

During the course of these negotiations, Mother informed Father of her intent to relocate with the children from Nashville, Tennessee to Houston, Texas in April of 2005. Father filed a Petition which opposed the relocation and sought to modify custody. Mother responded to the Petition, filed a Counter-Petition, and the parties negotiated the issue of relocation. On September 15, 2005, the parties submitted an Agreed Order and attached Parenting Plan which modified the existing Orders from 1994 and 2004. No other issues were reserved in the Agreed Order, but the Order stated that "this case is before the court on Mr. Williams' Petition in Opposition of Relocation and Ms. Lankford's Response to the Petition."

After entry of this Agreed Order, Mother's counsel moved to set her case for trial on the issue of Father's responsibility for unpaid medical expenses, interest, attorney's fees, and sanctions against Father for failure to pay timely child support. The parties set the case for trial and then agreed to reschedule it. Father then moved to dismiss the case because there was no pending issue before the court and because it was barred by *res judicata*. On September 11, 2006, the parties entered into an Agreed Order which stated that "there are no pending matters before the court and that this case was improvidently set on the court's docket for hearing. . . ."[1]

On September 22, 2006, Mother filed a Petition claiming past due child support in the amount of $1,250, unpaid medical expenses in the amount of $11,297.60, and requesting income information from Father. Father moved to dismiss Mother's claims on the basis of *res judicata.* The trial court heard the motion on January 26, 2007, and granted Father's motion, stating that "the issues raised by Mother in her Petition of September 22 are barred by the doctrine of Res Judicata," and granted Father attorney's fees in the amount of $4,140.00. Mother appeals.

Issues

On appeal, Mother raises three issues:

[1] The reason for this Agreed Order is that at the time the case was set for trial, no Petition had been filed by Mother concerning her claims of unpaid medical expenses, interest, and attorney's fees or her request for sanctions against Father for failure to timely pay his obligation of child support.

1. Whether the trial court erred in dismissing [Mother's] petition for unpaid child support, medical expenses, and income information on the basis of *res judicata.*

2. Whether the trial court erred in admitting evidence of the parties' previous and unrelated settlement negotiations.

3. Whether the trial court abused its discretion in awarding attorneys' fees to [Father].

Standard of Review

This Court reviews findings of fact made by a trial court sitting without a jury under a *de novo* standard with a presumption of correctness for those findings, unless the preponderance of the evidence is otherwise. **Tenn. R. App. 13(d)** (2007). This Court reviews a trial court's conclusions of law *de novo* with no presumption of correctness. ***Union Carbide Corp. v. Huddleston*****,** 854 S.W.2d 87, 91 (Tenn. 1993) (citing ***Estate of Adkins v. White Consol. Indus., Inc.***, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989).

Discussion

The first issue in this appeal is whether the trial court erred in applying the doctrine of *res judicata* to Mother's request for child support arrearages, unpaid medical expenses, and income information, most of which accrued prior to the September 15, 2005 Agreed Order. Father argued, and the trial court agreed, that Mother's claims were barred based on issue preclusion.

Generally, there are two types of *res judicata* preclusion, claim preclusion and issue preclusion. The two types have been described as follows:

The doctrine of claim preclusion bars a second suit between the same parties or their privies *on the same cause of action* with respect to all issues of fact or law which were or could have been litigated in the concluded suit. ***Ostheimer v. Ostheimer***, No. W2002-02676-COA-R3-CV, 2004 WL 689881 at *5 (Tenn. Ct. App. March 29, 2004) (*no perm. app. filed*) (citing ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987)). In contrast, the doctrine of issue preclusion, or "collateral estoppel," bars parties or their privies from relitigating issues of fact or law which were actually and necessarily determined in a former action between them. ***Id.*** (citing ***King v. Brooks***, 562 S.W.2d 422, 423 (Tenn. 1978)). Thus, claim preclusion bars any claims that "were or could have been litigated" in a second suit between the same or related parties involving the same subject matter. ***Id.*** Issue preclusion, on the other hand, bars parties from relitigating issues of fact or law that were actually litigated and resolved in a former proceeding. ***Id.*** (citing ***Dickerson v. Godfrey***, 825 S.W.2d 692, 694 (Tenn. 1992)).

We have stated before that "[i]t is well-settled that equitable defenses generally do not apply in child support arrearage cases. ***Id.*** at *5 (citing ***Rutledge v. Barrett***,802 S.W.2d 604, 6 07 (Tenn. 1991)). But, in cases involving child support arrearages, *res judicata* in the form of issue preclusion has been permitted as a defense, requiring the party asserting the defense to show that the issue was actually resolved in the former proceeding. ***Id.*** (citing ***Thomas v. Thomas***, No. E2001-00191-COA-R3-CV, 2001 WL 1268514 at *3 (Tenn. Ct. App. Oct. 23, 2001) (*no perm. app. filed*); ***McPherson v. Bridges***, No. 02A01-9302-GS-00030, 1993 WL 516255 at *2 (Tenn. Ct. App. Dec. 14, 1993) (*no perm. app. filed*); ***Gregory v. Gregory***, 803 S.W.2d 242 (Tenn. Ct. App. 1990). To assert a *res judicata* defense in a child support case, the defendant must "prove with certainty" that the former proceeding actually addressed and resolved the issue. ***Gregory***, 803 S.W.2d at 245. Where there is any uncertainty, the doctrine of *res judicata* does not apply. ***Strzelecki v. McGriff***, No. M1999-00057-COA-R3-CV, 2000 WL 48501 at *1 (Tenn. Ct. App. Jan. 21, 2000) (*no perm. app. filed*)..

Applying this principle to the instant case, Father must submit sufficient evidence to show that the parties intended for the September 15, 2005 Agreed Order and attached Parenting Plan to resolve Mother's claims for child support, medical expenses, and income information. Father submits that the two letters from Mother's Counsel dated October 22, 2004, and October 29, 2004, and Mother's Answer with a proposed Parenting Plan show that her claims were "extensively discussed, negotiated, and litigated." Our examination of the record reveals that these letters discuss her claims for unpaid medical expenses and the Answer with the attached Parenting Plan address how such payments could be handled in the future. All of these documents were in response to Father's Petition to Modify and for Injunctive Relief, not in response to Father's Petition in Opposition of Relocation. On November 18, 2004, an Agreed Order regarding the Petition to Modify and for Injunctive Relief was filed. It resolved some of the parties' disputed issues and explicitly reserved all other matters. This Order does not address or resolve Mother's claims that are at issue today.

The next dispute between the parties began when Father filed a Petition in Opposition of Relocation and to Modify Custody. Mother responded by filing a Response to Petition Combined with Counter Petition for Permission to Relocate with the Children. The September 15, 2005 Agreed Order for this set of petitions states that:

> This case is before the court on Mr. Williams Petition in Opposition of Relocation and Ms. Lankford's Response to the Petition. The parties have resolved all issues in accordance with the Parenting Plan attached hereto as **Exhibit 1.** The court finds the Order to be in the best interest of the parties' minor children and that the Order should be adopted as the Order of this court. According, it is hereby ORDERED that the Parenting Plan attached hereto is hereby approved and adopted as the Order of this court.

The attached Parenting Plan, also dated September 15, 2005, states that it "modifies an existing Order dated August, 1994 and November, 2004." Father argues that because retroactive support was "set at zero" and the Agreed Order states that the "parties had resolved all issues in accordance with the Parenting Plan," Mother's claims are barred.

We disagree. We are not persuaded that the language "[t]he parties have resolved all issues in accordance with the Parenting Plan" shows that Mother's claims were contemplated and litigated during the negotiation of the new Parenting Plan. A plain language reading of the Petition indicates otherwise. In its first sentence, the Agreed Order states that this case is before the trial on the issue of *relocation*. Nothing in the Petition in Opposition of Relocation, Counter Petition, or the new Parenting Plan mentions or resolves Mother's claims regarding unpaid child support or unpaid medical expenses or her request for Father's income information.

The new Parenting Plan addresses issues related to relocation, and because the parties significantly changed the custodial situation,[2] several things within the Parenting Plan were modified. The section regarding retroactive support is left blank (characterized by Father as being "set at zero"); however, Mother is not claiming that she is entitled to "retroactive relief" as referenced in the Retroactive Support section in the Parenting Plan. The Retroactive Support section that the parties left blank in the Parenting Plan refers to situations where monthly support is awarded for the time period that accrues prior to when *initial support* is set, not for situations such as this, when child support has already been set, but one party claims it has not been paid. **Tennessee Child Support Guidelines, § 1240-2-4.06** (June 2006). Further, nothing in the Parenting Plan indicates that it, as a modification to prior Orders, dissolves any prior claims that either party has. Had Father intended the Agreed Order to resolve any issues regarding Mother's claims for child support, medical expenses, or income information, he could have inserted language in the Agreed Order absolving himself from that liability.

Consequently, we must conclude that the evidence preponderates against the trial court's determination that Mother's claim for unpaid child support, unpaid medical expenses, and request for income information is barred by the doctrine of *res judicata*. We do not find that mother is entitled to all amounts that she claims she is due; we offer no opinion on that issue. Rather, we find that Mother should be allowed to bring her claims regarding those unpaid amounts and her request for income information, if she still desires.

Father argues, alternatively, that if Mother's claims are not barred by *res judicata*, he should not be required to pay for the claimed arrearages because he has already paid "approximately $60,000 in excess of any amount ordered by the trial court." Father does not cite any authority to support his contention that the overpayments should not be considered a gift. Rather, he argues that the "courts have no authority to retroactively modify child support amounts for periods prior to the time a petition to do so is filed." ***Pestell v. Pestell***, No. M2005-00749-COA-R3-CV, 2006 WL 2527642 (Tenn. Ct. App. Aug. 24, 2006)(*no perm. app. filed)*. Father's argument is misguided; this Court is not attempting to retroactively modify the child support in this case. The more relevant issue is how Father's alleged "overpayments" should be categorized - as a gift or as a child support prepayment. Certainly, the court may credit an obligor parent's overpayments against arrearages in some circumstances. ***DeWerff v. DeWerff***,

[2]Prior to the September 15, 2005 Parenting Plan, Mother had full custody of the children. The new Parenting Plan split the children between the parents. Hunter Williams was to relocate with Mother in Houston, Texas, and Shannon was to stay in Nashville, Tennessee, with Father.

No. M2004-01283-COA-R3-CV, 2005 WL 2104736 at *3 (Tenn. Ct. App. Aug. 31, 2005) (*no perm. app. filed*) (citing ***Koehler v. Koehler***, 559 S.W.2d 944, 950 (Tenn. Ct. App. 1977)).[3]

Although Father does not make the argument, we are mindful of situations where the obligor parent makes additional payments necessary for the child's well-being. In situations such as this, if the custodial parent either refuses or fails to provide necessities, and the obligor parent pays for those necessities, those amounts may be credited against their child support obligations. ***E.g., Peychek v. Rutherford,*** No. W2003-01805-COA-R3-JV, 2004 WL 1269313, at *4 (Tenn. Ct. App. June 8, 2004) (*no perm. app. filed*). To successfully assert a claim that such payments were necessary, the claiming party must demonstrate that the child needed the goods or services provided; that the custodial parent had a legal obligation to provide the goods or services; that the custodial parent failed to provide the goods or services; and the cost of those goods or services. ***Id.*** Further, a party asserting that payments knowingly made in excess of his/her child support obligation were intended to be prepayments has the burden of demonstrating that such intent existed at the time the payment was made and that such intent was communicated to the obligee parent. ***DeWerff***, 2005 WL 2104736 at *3.

We find nothing in the record that indicates that Father's payment were made because Mother failed to provide necessities to the children nor that reflects Father's intent for those overpayments to be "prepayments." Thus, Father does not meet his burden. The trial court did not consider this argument because it found that Mother's claims were barred by *res judicata*. Accordingly, this issue is remanded to the trial court for further proceedings consistent with this opinion.

This decision pretermits Mother's argument that the trial court erred in admitting evidence of the parties' settlement negotiation. Because that evidence was proffered in support of Father's *res judicata* argument, and we find that Mother's claims are not barred, this issue is moot.

Also, in light of our decision, we vacate the trial court's award of attorney's fees to Father. We find Mother's claim to have merit and find no evidence of bad faith on her behalf.

The decision of the trial court is reversed and the case is remanded for further proceedings consistent with this Opinion. Costs in this cause are assessed against the Appellee, Ernest Bland Williams, IV, for which execution may issue, if necessary.

[3] ***Koehler***, however, did not discuss whether, under the facts of that case, the prior payments in excess of the court-ordered amount should be considered gifts

W. FRANK CRAWFORD, JUDGE